

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 21, 2007

STATE OF TENNESSEE v. ROGER MELSON

**Direct Appeal from the Circuit Court for Blount County
Nos. C-13334, C-13335, and C-13336 D. Kelly Thomas, Jr., Judge**

No. E2006-02483-CCA-R3-CD - Filed September 27, 2007

The Defendant, Roger Melson, pled guilty to aggravated assault, domestic assault, and aggravated burglary, and the trial court sentenced him to five years, with six months to be served in jail and the balance to be served on probation. Subsequently, the trial court issued a warrant alleging that the Defendant violated his probation, and, after a hearing, it revoked the Defendant's probation. On appeal, the Defendant claims the trial court abused its discretion by revoking his probation because the State failed to prove that he willfully violated his probation. Finding no error, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, J.J., joined.

Mack Garner, Maryville, Tennessee; J. Liddell Kirk, Knoxville, Tennessee, for the Appellant, Roger Melson.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Michael L. Flynn, District Attorney General; Ellen Berez, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

On August 27, 2001, the Defendant pled guilty to aggravated assault, domestic assault, and aggravated burglary, and the trial court sentenced him as a Range I standard offender to an effective sentence of five years, with all but six months suspended. The trial court also ordered the Defendant to pay court costs and fines, perform 250 hours of community service, complete a medical and psychological examination and follow the doctors' recommendations, undergo alcohol and drug

treatment, complete anger management classes, and eliminate all contact with Rose Melson and Freddie Mitchell. On April 26, 2002, the trial court issued a warrant for the Defendant's arrest based on allegations that he had violated the terms of his probation. He was released after the hearing on May 13, 2002, to continue supervised probation. On January 10, 2005, the trial court again issued a warrant for the Defendant's arrest based on allegations that he had violated the terms of his probation, and on November 20, 2006, it conducted a hearing and revoked the Defendant's probation. At that hearing, the following evidence was presented:

Michael Graham, the Defendant's probation officer, testified that the Defendant was admitted to the Veterans' Affairs ("VA") Hospital for cardiopulmonary treatments, anger management, and alcohol and drug counseling on April 8, 2004. The Defendant was later discharged from the VA Hospital for "infringement of [hospital] rules and policies" on November 12, 2004. While at the VA Hospital, the Defendant only completed Phase I of the Substance Abuse Treatment Program and did not complete the anger management program. After June 3, 2004, Graham never saw the Defendant again and the Defendant never told him that he had been discharged from the VA Hospital. At one point, Graham heard from the Defendant's brother, who verified that the Defendant was still at the VA Hospital. Graham testified that the Defendant owes \$745.00 in supervision costs and \$3,304.94 in court costs. Graham stated that the Defendant has completed his community service requirement, but has not finished his alcohol and drug treatment.

The Defendant testified that he attended his alcohol and drug treatment program at the VA Hospital three times a week and that Graham had called him a few times. The Defendant admitted that he was discharged from the VA Hospital because he was caught drinking beer on federal property, which violated the hospital rules. The Defendant further admitted that he did not think notifying Graham was necessary because "[he] figured getting caught with that alcohol charge there that [he] was violated anyway." When asked about his means of support for the past year, the Defendant said he has been performing odd jobs and living with his family members, and would continue to do so if he stayed on probation. He has also since been charged with DUI in Johnson City and admitted to drinking a six-pack of beer every other day.

The trial court found that the Defendant had violated his probation, stating, "When [the Defendant] will not follow the rules of release and continue[s] to drink and be around automobiles with his history of alcoholism and other problems, it is a danger for him to be in the public. I think the violation is clear." The trial court proceeded to list the various times the Defendant had been missing and noncompliant with the orders, and then it ordered the Defendant to serve the remainder of his sentence at the Special Needs Unit of the Department of Correction. It is from this judgment that the Defendant now appeals.

II. Analysis

The Defendant contends that the trial court abused its discretion by revoking his probation and ordering him to serve the rest of his sentence at the Special Needs Unit of the Department of Correction. Specifically, he argues that the trial court erroneously relied on the Defendant's new

DUI charge to revoke probation when there was no evidence presented about the DUI. Additionally, the Defendant claims that lawfully using alcohol does not violate the probation terms and that the classification of a “danger” was unjustified. Finally, the Defendant admits to being “behind” on costs and fees and not remaining in contact “as much as he should” with his probation officer, but argues that the trial court “revoked, at least in part, based on facts that are not supported by any evidence presented at the hearing.”

The State responds that the trial court properly revoked probation because the Defendant violated numerous conditions of his probation, including not contacting his probation officer for over a year, not paying his supervision fees and court costs, and not completing the prescribed alcohol and drug treatment program. We agree with the State.

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); see T.C.A. §§ 40-35-308, -310, -311 (2006). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e). After finding a violation, the trial court is vested with the statutory authority to “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered” *Id.*; accord *Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension” T.C.A. § 40-35-310.

The decision to revoke probation is in the sound discretion of the trial judge. *State v. Kendrick*, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court’s decision that a violation of the conditions of probation occurred. *Id.*; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court’s finding to revoke probation, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. *Mitchell*, 810 S.W.2d at 735. In our view, after exercising a conscientious judgment as to whether or not a Defendant has violated the terms of a probated sentence, the trial court must also exercise a conscientious rather than arbitrary judgment as to an appropriate disposition. *State v. Steven Kelly Frazee*, No. M2005-01213-CCA-R3-CD, 2006 WL 618300, at *9 (Tenn. Crim. App., at Nashville, Mar. 13, 2006), *perm. app. denied* (Tenn. 2006).

In this case, the Defendant admitted that he had not contacted his probation officer for over a year. Rule 9 of the Defendant's Supplemental Probation Order requires that the Defendant report to his probation officer according to the officer's directions; by not reporting, the Defendant violated this term of probation. Furthermore, the Defendant also admitted to drinking a six-pack of beer every other day. This violates Rule 7, which requires that the Defendant not "use intoxicating beverages or controlled substances." Moreover, the Defendant did not complete the anger management classes or the alcohol and drug treatment program, in violation of Rule 13 of the Order. The Defendant also still owes \$745.00 in supervision costs and \$3304.94 in court costs, which is a violation of Rules 10 and 15. Furthermore, the Defendant violated Rules 2, 3, and 4 of the Order by not immediately notifying his probation officer of any arrests, changes in employment, or changes in residency, respectively. Accordingly, we conclude that there is substantial evidence to support the trial court's decision that the Defendant violated his probation conditions in this case. We conclude that the trial court did not abuse its discretion when it revoked the Defendant's probation and ordered the Defendant to serve his sentence in the Special Needs division of the Department of Correction.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE